

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 31, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP2484-CR**

**Cir. Ct. No. 2014CF2738**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KRISTOPHER CRAIG RUSSELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Kristopher Craig Russell appeals a judgment of conviction, entered upon his guilty plea, for possession with intent to deliver a controlled substance. The sole issue on appeal is whether the circuit court should have suppressed the evidence that police found when they conducted a protective

search of Russell's car. Because we conclude that the search was lawful, we affirm.

### **Background**

¶2 Based on evidence discovered during a traffic stop, the State charged Russell with possession with intent to deliver 200 grams or less of tetrahydrocannabinols, a controlled substance. *See* WIS. STAT. § 961.41(1m)(h)1. (2013-14).<sup>1</sup> Russell moved to suppress the evidence. Milwaukee police officers Erin Tischer and James Sommer, who conducted the traffic stop, were the only witnesses to testify at the suppression hearing. The State also presented the squad car video that recorded the stop.

¶3 The evidence at the hearing revealed that Russell was driving a car on the 2900 block of North 27th Street in Milwaukee, Wisconsin at approximately 1:24 a.m. on June 22, 2014. At that time, Tischer and Sommer, who each had eight years of law enforcement experience, were working in the area as part of the Neighborhood Task Force, which Tischer described as a unit of specialty officers that saturates high crime areas. The officers heard excessively loud music coming from Russell's car and conducted a traffic stop of the vehicle. As Tischer approached the driver's side of the car on foot, she saw Russell reaching around inside the passenger compartment area while his shoulder rose and fell. Russell repeated his motions at least twice, each repetition lasting for a matter of seconds. Based on past experience observing individuals making similar motions, Tischer

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

interpreted Russell's activity as an attempt to retrieve or discard either a firearm or illegal substances.

¶4 Tischer asked Russell about the motions she observed. He replied that he was reaching for his wallet, but, Tischer testified, she could see his wallet on his lap and he nonetheless continued to make reaching movements with his hands. Tischer also noted that Russell appeared nervous; she could see his chest rapidly rising and falling, and he seemed to be trying to control his breathing. Tischer directed Russell to exit his vehicle so that she could conduct a protective search of the car. Russell complied. As Tischer began the search, she smelled the odor of fresh marijuana emanating from the car. Behind the driver's seat, she found a digital scale and 111.18 grams of a substance that subsequently tested positive for the presence of tetrahydrocannabinols.

¶5 Tischer went on to identify the squad car video that recorded the traffic stop. While the video played, she narrated it for the circuit court and explained how the video corresponded to events as they unfolded at the scene.

¶6 Sommer testified briefly about his role in the traffic stop. As relevant here, he said he waited with Russell while Tischer conducted the protective search of the car. Sommer described Russell as cooperative but nervous and very fidgety.

¶7 The circuit court concluded that the search of Russell’s car was reasonable and denied the suppression motion. Russell pled guilty as charged, and he now appeals.<sup>2</sup>

### Discussion

¶8 “Whether evidence should be suppressed is a question of constitutional fact. In reviewing questions of constitutional fact, we uphold a circuit court’s factual findings unless clearly erroneous, but we independently determine whether those facts meet the constitutional standard.” *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899 (citation omitted).

¶9 A police officer may stop a person if the officer reasonably suspects a violation of the law. *See State v. Iverson*, 2015 WI 101, ¶52, 365 Wis. 2d 302, 871 N.W.2d 661. During an investigative stop, an officer may conduct a protective search to determine whether a detained person is armed, “if the officer is ‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Johnson*, 2007 WI 32, ¶21, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted). The test to determine the validity of a protective search for weapons is objective, namely, whether a reasonably prudent officer in the circumstances would be warranted in the belief that the officer’s safety and the safety of others was at risk because the individual may be armed and dangerous. *See State v. Kyles*, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449.

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<sup>2</sup> In an appeal from a judgment of conviction, we may review a circuit court’s order denying a motion to suppress evidence notwithstanding the defendant’s guilty plea. *See* WIS. STAT. § 971.31(10).

¶10 When a person is stopped in a vehicle, the search for weapons may extend to the passenger compartment of the person's vehicle. See *State v. Moretto*, 144 Wis. 2d 171, 177-78, 423 N.W.2d 841 (1988). The protective search of the vehicle is justified if “an officer reasonably suspects that the person ‘is dangerous and may gain immediate control of weapons’ placed or hidden in the passenger compartment.” See *Johnson*, 299 Wis. 2d 675, ¶24 (citation and ellipsis omitted).

¶11 Preliminarily, we note that, on appeal, Russell does not dispute the lawfulness of the traffic stop here, which was grounded on suspicion that he violated an ordinance prohibiting excessive noise. See MILWAUKEE, WIS., CODE § 80-63(1) (2009). He also does not challenge the circuit court's findings of fact. He asserts only that the protective search of his car was not justified because, he argues, the facts do not give rise to a reasonable suspicion that he was dangerous. Because the relevant facts are not disputed, the determinative question is whether they satisfy the constitutional requirement for performing a protective search for weapons. See *Kyles*, 269 Wis. 2d 1, ¶7. We turn to that question.

¶12 At the outset of the traffic stop, Tischer observed Russell at least twice reach around inside the passenger compartment, and she saw his shoulder rise and fall. Tischer testified that in her experience, these types of movements are consistent with an attempt to retrieve or discard a weapon. Russell argues that his reaching motions were not enough, standing alone, to support a reasonable suspicion that he was dangerous. See *Johnson*, 299 Wis. 2d 675, ¶¶42-43. Russell's motions, however, did not stand alone. We must consider whether the totality of circumstances supports the protective search. See *id.*, ¶¶35-36.

¶13 Among those circumstances is that Russell gave Tischer an unsatisfying explanation for the furtive movements she observed. He told her that he was reaching for his wallet, but Tischer could see the wallet was on his lap as she approached the driver's side window, and Russell nonetheless continued "moving [his hands] around the driver's side compartment area." A suspect's response to an officer's inquiry "may provide information that is relevant to whether a protective search is reasonable." *State v. Bridges*, 2009 WI App 66, ¶20, 319 Wis. 2d 217, 767 N.W.2d 593. Indeed, any response that an officer receives "will be helpful in appraising the risk presented more accurately." *Id.* (citation omitted). In this case, Russell's response was curious at best and did not allay the officer's concerns. To the contrary, Tischer testified she could see Russell was "reaching around" but she could not determine "exactly what he was attempting to reach for" as she approached him.

¶14 Also significant is the officers' observation that Russell was nervous during the traffic stop. Tischer "could see his chest rising [and] falling rapidly" and Sommer described Russell as "nervous and very fidgety." Russell reminds us that nervousness is common when a person is stopped by police. *See State v. Sumner*, 2008 WI 94, ¶38, 312 Wis. 2d 292, 752 N.W.2d 783. In his view, he exhibited only "typical nervousness" that should not be deemed an indication of dangerousness. We are not persuaded. While a suspect may typically be "somewhat nervous" during a routine traffic stop, *see id.*, ¶38 n.18 (citation omitted), visible manifestations of nervousness support an officer's reasonable suspicion, *see id.*, ¶¶39-40, and a suspect's fidgeting behavior may suggest that wrongdoing is afoot, *see id.*, ¶38 n.18.

¶15 Additionally, the police stopped Russell at 1:30 a.m. in a neighborhood that Tischer described as a high-crime area "stricken with violent

aggravated assaults such as shootings.” Both the reputation of an area and the lateness of the hour are factors that may properly contribute to an officer’s reasonable suspicion. *See State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999). Finally, the training and experience of the police officers involved in an investigative stop are relevant considerations in the totality of the circumstances equation. *See id.* Here, Tischer concluded that Russell’s behavior raised safety concerns, a conclusion based on her eight years of experience as a Milwaukee police officer and her status as a member of a “unit of specialty officers” assigned to a task force that “proactively saturate[s] high crime areas” in the city.

¶16 We are satisfied that the totality of the circumstances, including the time of day, the nature of the area where the traffic stop took place, the furtive movements that Russell made, and his unsatisfying explanation for those movements, gave rise to a reasonable suspicion that he was dangerous. A protective search of his car was therefore lawful. *See Johnson*, 299 Wis. 2d 675, ¶24. Accordingly, the circuit court properly denied Russell’s motion to suppress the evidence uncovered during that search.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

